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**UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA**

IN RE SUBPOENA TO META PLATFORM,
INC.,

IN CONNECTION WITH:

EVERETT BLOOM, an individual, on behalf
of himself, the general public, and those
similarly situated,

Plaintiff,

v.

ZUFFA, LLC,

Defendant.

Misc. Action No. _____

In connection with Case No.: 2:22-cv-00412-
RFB-BNW (D. Nev.)

**PLAINTIFF'S MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF MOTION TO COMPEL
NON-PARTY PRODUCTION AND
DEPOSITION BY META PLATFORM,
INC. PURSUANT TO SUBPOENA AND
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

Date: May 30, 2023

Time: TBD

Place: TBD

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STATEMENT OF ISSUES TO BE DECIDED PER CIVIL L.R. 7-4(A)(3).

1. Whether non-party Meta Platform, Inc. (d/b/a Facebook) should be required to produce Documents and deposition testimony responsive to Plaintiff's Subpoena of December 15, 2022.

MEMORANDUM OF POINTS AND AUTHORITIES**I. INTRODUCTION**

As allowed under both F. R. Civ. P. 34 and 45, Plaintiff hereby moves to compel non-party entity Meta Platform, Inc. (“Meta”, d/b/a Facebook) to produce Documents and a deposition witness relating to the transfer of data—including URLs containing the titles of video recordings viewed or requested by Zuffa LLC’s subscribers—to Facebook without the consent of those users, in violation of the Video Protection Privacy Act. Plaintiff has complied with F. R. Civ. P. 34 and 45. As an entity with its principal place of business in the city of Menlo Park, California, this Court also has both personal and subject matter jurisdiction over Meta and this Motion because it is the Court for the district where compliance is required as provided by F. R. Civ. P. 45(d)(2)(B)(i).

II. BACKGROUND

Plaintiff Everett Bloom has sued Defendant Zuffa LLC in the District of Nevada for violation of the federal Video Protection Privacy Act and related California privacy laws. Decl. of Anthony J. Patek in Support of Miscellaneous Action and Motion to Compel Non-Party Production and Deposition by Meta Platform Inc. in Response to Subpoena (“Patek Declaration”), ¶ 3, Ex. 1. The alleged privacy violations stem from Zuffa’s use of Facebook software tracking devices called pixels. *Id.* Meta owns and operates the Facebook web site and the relevant Facebook pixels. *Id.* Plaintiff’s complaint alleges that, as a result of Zuffa LLC’s use of a Facebook pixel (i.e., a tracking device offered by Facebook to its business clients) on Zuffa’s web site, Meta receives personally identifiable information and other information about Defendant’s consumers, including Plaintiff. *Id.* Plaintiff Bloom now seeks Meta’s records of the data transmitted, as well as access to software code and deposition testimony from Facebook regarding how the Facebook pixel used by Zuffa works. *Id.*

Meta has in its possession, custody, and control records of Facebook pixel tracking of Page View events triggered when Zuffa users view recorded videos on Zuffa LLC’s Fight Pass Website. Patek Decl., ¶ 4. Meta also has custody and control of the relevant software code, and

1 employs the people who designed and implemented that code, and are thus familiar with its
2 function. *Id.* Plaintiff has obtained evidence from Defendant Zuffa LLC that, each time a user
3 views a recorded video on Zuffa’s Fight Pass website, they unknowingly trigger a Facebook
4 pixel Page View event that sends their personally-identifiable video viewing information from
5 their computer to Facebook. *Id.* The evidence within Meta’s possession is thus highly probative
6 evidence of not only the merits of Plaintiff’s case, but Plaintiff’s ability to prove his claims on a
7 classwide basis. *Id.*

8 Despite diligent attempts to obtain discovery from Zuffa, Plaintiff has been unable to
9 obtain records of the exact data sent to Facebook when users watched Zuffa videos on its web
10 site. Patek Decl., ¶ 5. Plaintiff served requests for production on Zuffa LLC nearly a year ago,
11 on May 15, 2023. *Id.*, Ex. 2. These included multiple requests that would have covered records
12 of data transferred to Facebook when user’s accessed videos. In particular, RFP 27 asked for
13 “ALL DOCUMENTS RELATED to transmission of PLAINTIFF’S SUBSCRIBER DATA to
14 FACEBOOK in connection with PLAINTIFF’S use of the UFC FIGHT PASS or the FIGHT
15 PASS WEBSITE, INCLUDING records showing ANY transmission of: . . . (3) PLAINTIFF’s
16 Facebook ID; [or] (4) the URL of the website hosting the videos requested or obtained by
17 PLAINTIFF . . .” *Id.* Zuffa responded to RFP 27 by stating that it had no responsive documents.
18 *Id.* Zuffa also failed to provide evidence of URL or video title information relayed to Facebook
19 in response to interrogatories. *Id.*, Exs. 3 & 4. Zuffa LLC’s 30(b)(6) witness also testified that
20 Zuffa does not know what data its subscribers’ computers send to Meta when use of Zuffa’s web
21 site triggers the Facebook pixel, and that Zuffa does not know how the Facebook pixel tracks
22 user activity to support ad targeting. Patek Decl., ¶ 5.

23 Given Zuffa’s statements that it has no records of the data transferred to Meta by Zuffa’s
24 use of the Facebook pixel, nor knowledge of how the Facebook pixel functions, Plaintiff sought
25 to obtain the evidence from Meta, the recipient of the alleged unlawful data transfers and
26 designer of the relevant tracking pixel. Patek Decl., ¶ 6. On December 15, 2022, Plaintiff, acting
27 by and through his attorneys, served on non-party entity Meta a subpoena to produce various
28 Documents (the “Subpoena”) and a witness for deposition. *See* Patek Decl., Exhibit 5.

1 The Subpoena commands Meta to produce Documents relating to Plaintiff's allegations
 2 that, *inter alia*, Defendant Zuffa, LLC wrongfully sends third-party entity Meta personally
 3 identifiable information identifying videos rented and/or viewed by Zuffa's consumers in a
 4 manner that discloses to third parties the video viewing history of Zuffa's customers, contrary to
 5 the Video Privacy Protection Act, 18 U.S.C. § 2710 ("VPPA"), Cal. Civ. Code § 1799.3, the
 6 California Constitution, and the California Unfair Competition Law, Cal. Bus. & Prof. Code
 7 § 17200, *et. seq.* Patek Decl., ¶ 7, Exs. 5 & 5A. Specifically, the subpoena commands production
 8 of Documents relating to (1) data Meta acquired about Plaintiff from either Defendant, (2)
 9 Defendant's website ufcfightpass.com, or (3) Plaintiff's use of Defendant's video content
 10 subscription service, UFC Fight Pass. *Id.* The subpoena also requests (4) Documents relating to
 11 data Meta has obtained from Defendant, including data obtained from Defendant's website and
 12 video content subscription service and Plaintiff's use of that service, and (5) any software code
 13 responsible for producing that data. *Id.*

14 Meta provided a boilerplate form response to the Subpoena on December 22, 2022. Patek
 15 Decl., ¶ 8, Ex. 6. That form response indicated that Meta had received a subpoena, but would
 16 not produce documents concerning account details and non-content information that users could
 17 retrieve on their own. *Id.* On February 2, 2023, Plaintiff sent an email response confirming
 18 that the subpoena "seeks Account Details and Non-Content Information." *Id.*, Ex. 7.

19 Meta did not provide any individualized response to the subpoena until February 15,
 20 2023, when outside counsel at Perkins Coie LLP contacted Plaintiff's counsel. Patek Decl., ¶ 9,
 21 Ex. 8. On February 23, 2021, Plaintiff Bloom met and conferred with Meta. *Id.*, Ex. 9. At that
 22 meet and confer Meta indicated that it would consider producing relevant records responsive to
 23 category 4 (records of data relating to Plaintiff Bloom's use of the Fight Pass website transmitted
 24 to Meta) if Plaintiff could identify the relevant pixels, Mr. Bloom's Facebook User ID, and a
 25 pertinent data range. Patek Decl., ¶ 9. Plaintiff offered to limit its initial document requests to
 26 records of the data transferred to Facebook by Zuffa's Facebook pixel(s) that involved Plaintiff
 27 Bloom's Facebook User ID. *Id.* Plaintiff immediately provided Meta with the relevant Facebook
 28 pixels and Mr. Bloom's Facebook User ID, as well as a date range corresponding to the proposed

1 class period (i.e., March 4, 2018 to present). *Id.*, Ex. 9.

2 Meta rejected Plaintiff's proposal. *Id.*, ¶ 10. After a delay of nearly two more months,
 3 Meta transferred the matter to new outside counsel at Jenner & Block. *Id.*, Ex. 10. Upon learning
 4 this, Plaintiff met and conferred with Meta's new outside counsel, who informed him that they
 5 would not even consider producing responsive information unless Bloom could prove that he
 6 had exhausted efforts to obtain the relevant records from Zuffa. Patek Decl., ¶ 10. Bloom
 7 immediately provided Meta with copies of his discovery requests to Zuffa and Zuffa's responses
 8 stating it had no responsive documents, as well as Plaintiff's interrogatories and the fact that
 9 Zuffa's 30(b)(6) designee had confirmed Zuffa's lack of access to the requested information. *Id.*,
 10 Ex. 11. Despite this evidence of exhaustion, Meta immediately asserted, without any analysis or
 11 evidence, that Bloom could obtain all the records from Zuffa LLC, and stated point blank that
 12 Meta would produce documents in response to the subpoena. *Id.*, Ex. 12. Plaintiff responded
 13 that Meta's assertion was baseless and that it would move to compel a response. *Id.*, Ex. 13.
 14 Meta did not respond in any way. *Id.*, ¶ 10.

15 **III. ARGUMENT**

16 The Court should order Meta to produce documents and testimony responsive to the
 17 Subpoena. The Subpoena complies with Fed. R. Civ. Proc. 45(a)-(b) and Fed. R. Civ. Proc. 34(c).
 18 These are nonprivileged matters relevant to Plaintiff's claims and proportional to the needs of
 19 the case, because Meta's possession of Plaintiff or consumer information received via Zuffa's
 20 use of the Facebook pixel would tend to show Defendant was or is unlawfully causing personally
 21 identifiable information about its users' video rentals to be sent to third-party Meta, which is the
 22 substance of Plaintiff's allegations. Fed. R. Civ. P. 26(b)(1). Unless Zuffa LLC lied in its
 23 responses to Plaintiff's discovery, this information is in Meta's sole possession and involves data
 24 and Documents of which neither Plaintiff nor Defendant has custody and control.

25 **A. Plaintiff Exhausted Discovery from Defendant Zuffa**

26 Plaintiff Bloom has exhausted discovery from Zuffa LLC with respect to the documents
 27 and testimony requested. Bloom served requests for production seeking this information from
 28 Zuffa on May 15, 2022, which is roughly a year ago. At least with respect to RFP 27, which

1 corresponds to the most important information Plaintiff seeks from Meta, Zuffa responded
2 unequivocally that it had no responsive documents. See Patek Decl., Ex. 2 (response to RFP No.
3 27: “[F]ollowing a reasonably diligent search, Zuffa believes that no documents responsive to
4 this Request exist in its possession, custody, or control”). Bloom also sought the information
5 through interrogatories and 30(b)(6) deposition, to no avail. *Id.*, Exs. 3 & 4.

6 Meta has failed to identify any means by which Zuffa could obtain and produce the
7 relevant documents. Specifically, when Plaintiff’s counsel provided to Meta evidence of
8 Plaintiff’s efforts to obtain the relevant evidence from Zuffa, Plaintiff’s counsel stated the
9 following:

10 [Plaintiff Bloom] of course cannot preclude the possibility that
11 Zuffa is not being forthcoming [with records of data transferred to
12 Meta via the Facebook pixel]. If you are aware of any records or
13 interface (e.g., a Facebook pixel manager) that would contain the
14 requested evidence and is within Zuffa's custody and control,
15 please feel free to identify it. In the meantime, I am forced to
16 assume that Zuffa does not have access to the data requested.

17 Patek Decl., Ex. 11. Meta responded with its cursory assertion that Plaintiff had not exhausted
18 discovery from Zuffa, but without identifying any means by which Zuffa could obtain the
19 requested records. *Id.*, Ex. 12.

18 **B. Meta Has Identified No Valid Basis for Refusing to Respond**

19 Although Meta made boilerplate objections to the Subpoena via a form email, these
20 objections are insufficient to support its refusal to respond. *See id.*, Ex. 6. Boilerplate objections
21 that do not connect the objection to the factual basis for the objection are improper. *See, e.g.,*
22 *O’Shea v. Am. Solar Solution, Inc.*, 2016 U.S. Dist. LEXIS 23420 at *6 (S.D. Cal. Feb. 18, 2016)
23 (holding boilerplate objections are “the equivalent to not objecting at all”); *Gann v. Garcia*, 2022
24 U.S. Dist. LEXIS 13705 at *4 (E.D. Cal. Jan. 25, 2022) (holding boilerplate objections are not
25 sufficient response to a request for production). Plaintiff’s counsel met and conferred with Meta
26 on multiple occasions, but Meta has failed to provide any meaningful response. Indeed, Meta
27 offered the possibility of engaging in a “limited scope of discovery” following “21-days notice
28 to the user of an affected account,” but Meta has not provided any such notice to Plaintiff, and

Meta's counsel at Jenner & Block stated point blank they saw no need to responds to the subpoena. *See* Patek Decl., Exs. 6 and 12.

Further, to the extent Meta may argue that responding to the requests would be unduly burdensome, Plaintiff Bloom offered to narrow the document requests to a very discrete set of records pertaining to data collected by Zuffa's registered Facebook pixel that also references Plaintiff Bloom, further limited to the class period of March 4, 2018 to the present. Meta rejected that offer, thus proving that cost and burden are not its real concerns. Further, given its failure to identify specific costs and burdens, the Court should order Meta to produce documents and a deposition witness responsive to the Subpoena.

In the meet and confer between Bloom and Meta prior to this motion to compel, Meta provided three bases for refusing to respond to the subpoena. None of them withstand scrutiny.

1. The *Suufi* Decision is Easily Distinguishable

The first was Meta's contention that Plaintiff had not yet exhausted discovery from Plaintiff, in support of which it cited an order denying a motion to compel a subpoena response in *Suufi v. MediaLab.AI*, No. 22-mc-80205-SVK (N.D. Cal. Sept. 20, 2022) (slip opinion) (Patek Decl., Ex. 13); see also Patek Decl., Ex. 14 (transcript of hearing on *Suufi* Motion to Compel). But Meta's reliance on the unreported decision in *Suufi* is misplaced. As discussed above, Plaintiff has attempted to obtain the records it seeks from Defendant Zuffa, but has been unable to do so because Zuffa claims it has neither custody nor control of the information sought. In *Suufi*, the plaintiff had served its subpoena before it obtained any discovery from the defendant in that case; here, Bloom subpoenaed Meta only after receiving discovery responses from Zuffa claiming not to have the documents sought. In *Suufi*, the plaintiff sought the party-defendant's customer lists from Meta, which the defendant clearly had. Here, Bloom seeks Meta's records of data transmitted from consumer's computers to Facebook servers; there is no reason to believe Zuffa would have these records. In *Suufi*, Meta had identified how defendant could access the data requested (i.e., customer lists) without Meta having to produce it. Here, in contrast, Plaintiff asked Meta to identify a way Zuffa could access and produce the data directly, and Meta never identified any. The same is true with respect to information about the Facebook pixel's function.

1 In short, this case is distinguishable from *Suufi* because the data sought here cannot be obtained
2 from the defendant party, thus making third party discovery necessary.

3 **2. The Discovery is Relevant to Both Merits and Class Certification**

4 Meta's second objection in the meet and confer was the baseless assertion that the Nevada
5 district court had limited discovery to evidence supporting class certification. But the Nevada
6 district court has not bifurcated discovery between merits and class certification. Rather, that
7 court merely advised that "the parties should, as best as possible, prioritize discovery that is
8 relevant to class certification issues while deferring discovery that would be relevant only in the
9 event a class is successfully certified." *Bloom v. Zuffa LLC*, No. 2:22-cv-00412-RFB-BNW, Dkt.
10 No. 32 (D. Nev. May 25, 2022). The second, more pertinent shortcoming with Meta's objection
11 is that the evidence Plaintiff Bloom seeks is highly relevant to class certification, because it
12 demonstrates the existence of evidence (records in Meta's possession) that can be used on a
13 classwide basis to identify those whose privacy rights were violated.

14 **3. The Protective Order Negates Any Privacy Objections**

15 Meta's last objection was that producing evidence of data transfers would violate the
16 privacy rights of Meta's users. But Plaintiff offered to limit the initial production to only records
17 of data transfers involving *Plaintiff's* viewing records, so the initial request simply does not
18 implicate any other user's private information. Further, there is a protective order in place, so
19 any privacy objection is mitigate by the fact that the information would be produced to a limited
20 group of attorneys under the protective order in the Nevada case. More fundamentally, Meta's
21 objection is perverse, in that hypocritically alleges *theoretical* violations of privacy in an attempt
22 to cover up thousands of *actual* privacy breaches by Zuffa and Meta. Zuffa and Meta already
23 violated the privacy of the affected consumers; Meta's histrionics over the possibility of privacy
24 violations are crocodile tears from a company whose entire business model depends on collecting
25 and analyzing the private behavior of its users.

26 Because Meta has offered neither a meaningful response nor raised any valid
27 objection to either the Subpoena or any request for production despite being properly served a
28 Subpoena requesting production consistent with both F. R. Civ. P. 34 and 45, an order to compel

1 production of the narrowed document requests (i.e., records of data transmissions involving
2 Zuffa's registered Facebook pixels and Plaintiff Bloom's Facebook User ID, dated from March
3 4, 2018 to present) and deposition testimony (regarding the function of the Facebook pixel
4 implemented by Zuffa and interpretation of the data in Meta's records) is proper, and the Court
5 should issue such an order consistent with the aforesaid rules.

6
7 **IV. CONCLUSION**

8 For all the reasons above, the Court should grant Plaintiff's motion to compel Meta's
9 production of documents responsive to Plaintiff's Subpoena and to appear at deposition.

10
11 Dated: April 25, 2023

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